Filed 9/6/01

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ARTHUR ROMAN, Defendant and Appellant.	B145118 (Super. Ct. No. KA046943)
In re ARTHUR ROMAN, on Habeas Corpus.	B149269

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert M. Martinez, Judge. Affirmed. Petition for writ of habeas corpus denied.

William M. Duncan, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Acting Chief Assistant Attorney General, Marc E. Turchin, Acting Senior Assistant Attorney General, Pamela C. Hamanaka, Supervising Deputy Attorney General, Thomas C. Hsieh, Deputy Attorney General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II through V of the Discussion.

Defendant and appellant Arthur Roman was convicted of possession of a small quantity of methamphetamine and admitted three prior serious felony convictions within the meaning of Penal Code section 1170.12. Defendant was sentenced to 25 years to life in prison, pursuant to the Three Strikes Law. While defendant's appeal was pending, the newly-elected Los Angeles District Attorney, Stephen Cooley, issued a directive to his deputies that certain prosecutions, including controlled substance charges without quantity enhancements, were to be presumed by the deputies to be second strike cases, rather than third strike cases. Believing he would have received a more lenient sentence had he been prosecuted under this directive, defendant contends he should receive the benefit of the directive pursuant to the doctrine of abatement. We conclude the doctrine of abatement is wholly inapplicable to a district attorney's change in policy, and therefore affirm. In the unpublished portion of the opinion, we reject defendant's contentions the trial court erred in instructing the jury in the language of CALJIC No. 17.41.1; the trial court abused its discretion in refusing to strike his prior serious felony convictions; and his sentence violates the prohibition against cruel and unusual punishment. We also deny defendant's petition for writ of habeas corpus on the ground of ineffective assistance of counsel.

FACTS AND PROCEDURAL BACKGROUND

At 11:15 p.m. on December 26, 1999, Los Angeles Sheriff's Department deputies observed defendant and a female companion walking through a motel parking lot. Defendant was drinking from an open beer can. When the deputies patted defendant for weapons, they discovered a glass pipe used to smoke methamphetamine. Defendant was taken into custody, and a subsequent search revealed a plastic bag containing .25 grams of a substance containing methamphetamine in defendant's pocket. Defendant was charged with possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) and misdemeanor possession of a smoking device (Health & Saf. Code, § 11364). Defendant was convicted by a jury as charged. Defendant admitted three prior serious

felony convictions within the meaning of Penal Code section 1170.12, and two prior prison terms within the meaning of Penal Code section 667.5, subdivision (b). Defendant's motions to reduce the felony possession to a misdemeanor and to strike two or more of his prior serious felony convictions were denied. Defendant was sentenced to 25 years to life in prison.[1] Defendant filed a timely notice of appeal.

DISCUSSION

I. Unauthorized Three Strikes Sentence

A. District Attorney's Discretion

As a general rule, the selection of criminal charges is a matter subject to prosecutorial discretion. (*People v. Birks* (1998) 19 Cal.4th 108, 134.) However, the Three Strikes Law limits that discretion, and requires the prosecutor to plead and prove each prior serious felony conviction.[2] (Pen. Code, § 1170.12, subd. (d)(1).) Nor can the prosecutor unilaterally strike a prior serious felony conviction allegation. The prosecutor has no independent authority to abandon a prosecution. (Pen. Code, § 1386.) "When the jurisdiction of a court has been properly invoked by the filing of a criminal charge, the disposition of that charge becomes a judicial responsibility." (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 517.) The only discretion remaining in the prosecution is the ability to move to strike a prior serious felony conviction allegation in the

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[1] A concurrent sentence was imposed on the misdemeanor, and the two prior prison terms were stricken.

[2] This limitation on prosecutorial discretion does not violate the separation of powers doctrine. (*People v. Kilborn* (1996) 41 Cal.App.4th 1325, 1332-1333.)

furtherance of justice.[3] (Pen. Code, § 1170.12, subd. (d)(2).) Such a motion is directed to the discretion of the trial court. (Pen. Code, § 1385; *People v. Superior Court (Romero), supra,* 13 Cal.4th at p. 530.) "[A] district attorney can only recommend dismissal to the court. Dismissal is within the latter's exclusive discretion." (*People v. Parks* (1964) 230 Cal.App.2d 805, 812.)

B. District Attorney's Directive

In December 2000, District Attorney Cooley issued Special Directive 00-02, setting forth guidelines for the exercise of prosecutorial discretion in Three Strikes cases.[4] The directive provides that "[a]ll qualifying prior felony convictions shall be alleged in the pleadings." The directive further provides that, if the defendant has two or more prior serious felony convictions, the case is to be a "presumed third strike" case if the current offense is a serious felony or a controlled substance charge with a quantity enhancement. If it is not, the case is a "presumed second strike" case, in which the prosecutor should move the trial court under Penal Code section 1385 to strike all but one prior serious felony conviction allegation. The presumption may be rebutted. A head deputy may decline to move to strike a prior serious felony conviction allegation in a presumed second strike case if the current offense involves a deadly weapon, injury to a victim, or the threat of violence. Likewise, the bureau director may decline to move to strike in a presumed second strike case if other factors warrant that determination.

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3 The prosecution may also move to dismiss a prior serious felony conviction allegation if there is insufficient evidence to prove it. (Pen. Code, § 1170.12, subd. (d)(2).)

4 Defendant requests we take judicial notice of a press release setting forth Special Directive 00-02. The directive is undated, although the press release is dated December 19, 2000. We grant the motion for judicial notice. Defendant submits no evidence of any prior policy; nonetheless, we will assume that Special Directive 00-02 represented a change in policy.

C. Doctrine of Abatement

The judicial doctrine of abatement applies when the Legislature amends a criminal statute lessening punishment for an offense[5] and intends the amended statute to be applied retrospectively to judgments of conviction not yet final. Such an amended statute, rather than the old statute in effect when the offense was committed, applies to all judgments of conviction not yet final upon the amended statute's effective date. (*People v. Nasalga* (1996) 12 Cal.4th 784, 790.) A punishment imposed under the old statute is thus unauthorized. Accordingly, the issue of abatement may be raised for the first time on appeal. (*Id.* at p. 789, fn. 4.)

An amended statute lessening punishment is applied retrospectively if the statute expressly so provides; similarly, such a statute is applied prospectively only if the statute expressly so provides. (*In re Estrada* (1965) 63 Cal.2d 740, 744.) If the statute is silent on the issue of retrospective application, the courts will generally presume a legislative intent to apply the amended statute retrospectively. "When the Legislature amends a statute so as to lessen the punishment[,] it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply." (*In re Estrada, supra,* 63 Cal.2d at p. 745; *People v. Rossi* (1976) 18 Cal.3d 295, 299; *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1544-1545.) This inference is not automatic in every case of a statute that is silent as to whether it is to be applied retrospectively. (*People v. Nasalga, supra,* 12 Cal.4th at p. 793.) If the circumstances of the amendment suggest the amendment was intended to be given only prospective effect, that intention will be upheld. (*In re Pedro T.* (1994) 8 Cal.4th 1041, 1045-1046 [concluding that when

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[5] The doctrine also applies when the Legislature decriminalizes an offense.

a statute that temporarily increased a punishment expired by its own terms, the decreased punishment which applied after the term expired was not to be applied retrospectively].)

D. Inapplicability of Abatement to the Directive

The doctrine of abatement applies only when three factors are present: (1) a statute describing an offense or its punishment is amended by the Legislature;[6] (2) the amendment lessens the punishment for the offense; and (3) the Legislature intended that the amended statute be applied retrospectively. None of these elements are present in District Attorney Cooley's Directive.

1. The Directive Is Not A Legislative Enactment

The doctrine of abatement has been applied only to statutory enactments. Defendant contends the doctrine of abatement should be extended to District Attorney Cooley's policy. But the rationale for abatement applies only when a statutory amendment is at issue.

Abatement applies when the Legislature has lessened the punishment for an offense and intends the decrease to apply retrospectively. If abatement were not applied in that situation, the courts would be forced to uphold a penalty which the Legislature had determined was too severe and thus unauthorized. This is not the case when the change is nonstatutory, but simply a policy implementing the exercise of a prosecutor's discretion. Regardless of whether the policy results in a more severe or more lenient sentence, any sentence imposed would be a sentence authorized by the Legislature.

A similar situation was considered in *In re Winner* (1997) 56 Cal.App.4th 1481, where the appellate court considered whether a change in an implementing regulation

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[6] The doctrine is also applicable to ordinances. (See *Spears v. County of Modoc* (1894) 101 Cal. 303.)

could violate the prohibition against ex post facto laws. The petitioner, a prison inmate, had committed a serious disciplinary infraction, resulting in the forfeiture of his conduct credits. Subsequent to his infraction, the Director of Corrections promulgated a regulation prohibiting the restoration of credits for inmates who committed serious infractions. This was a change from prior policy, which had allowed restoration of credits. The inmate contended the change violated the prohibition against ex post facto laws. The appellate court disagreed, because at the time of the inmate's infraction, the statutory scheme provided the Director with discretion to determine whether credit should be restored for inmates committing serious infractions. (*Id.* at pp. 1486-1487.) As the amended regulation did not increase the punishment to which the inmate was subject under the applicable legislation, there was no ex post facto violation. (*Id.* at pp. 1487-1488.) The same rationale applies with respect to the doctrine of abatement. It is the statute setting forth the applicable punishment that is of significance, not the implementing policy. (Cf. *People v. Andrews* (1998) 65 Cal.App.4th 1098, 1103-1104 [different prosecutorial charging policies, as long as they each follow the law, do not result in a denial of equal protection].)

As there is no statutory amendment at issue in this case, the doctrine of abatement does not apply.

2. **The Directive Does Not Lessen the Punishment**

Even if the doctrine of abatement were extended to implementing policies, District Attorney Cooley's directive in this case does not lessen the punishment for the offense and is therefore an inappropriate candidate for abatement.

Defendant argues "there is no question that under [the new] policy[,] [he] would not have been charged under the Three Strikes Law." There is no basis for this argument. First, under the directive, all of defendant's prior serious felony convictions would have been alleged, as required by the Three Strikes Law. (Pen. Code, § 1170.12, subd. (d)(1).) The directive addresses only a deputy's discretion to move to strike. Second, the

prosecution might not have brought such a motion under the directive. The directive is not an absolute declaration that the prosecution must move to strike prior serious felony convictions in a "presumed second strike" case. The bureau director has discretion to determine whether a motion will be brought in such a case. Third, even if such a motion were brought, the trial court might not have granted it. Indeed, the trial court declined to strike any of defendant's prior serious felony convictions when defendant sought that relief. In short, it is not the case that "presumed second strike" cases prosecuted under this policy directive will necessarily expose defendants to only second strike sentences. Instead, "presumed second strike" cases prosecuted under the policy directive must be charged as third strike cases; the prosecution may choose not to move to strike prior serious felony conviction allegations; and the trial court may deny any motion to strike made by the prosecution.

The policy does not lessen the punishment to which defendants are exposed; as such, it is not a basis for the application of the doctrine of abatement.

3. The Directive Was Not Intended to Be Given Retrospective Application

Even if District Attorney Cooley's directive were viewed as akin to a legislative enactment lessening punishment, the doctrine of abatement would still not apply, as the directive could not have been intended to have retrospective application. The directive could have no effect on cases pending on appeal, as the cases would no longer be within the purview of the district attorney. The directive simply establishes a new policy, promulgated by the new Los Angeles District Attorney shortly after he took office, setting forth guidelines for the exercise of the discretion inherent in his office.

4. Summary

District Attorney Cooley's policy directive is not a statutory enactment; it does not lessen the punishment for an offense; and it was not intended to be given retrospective

application. The directive is simply the expression of an elected official's opinion on how to best exercise the discretion of his office. It effects no change in the law, but simply sets forth one prosecutor's policy on when to move the trial court to exercise its discretion to strike prior serious felony convictions. Defendant's sentence is not unauthorized. Accordingly, the doctrine of abatement is wholly inapplicable.

[The portions of this opinion that follow (parts II-V) are deleted from publication.]

II. CALJIC No. 17.41.1

The jury was instructed in the language of CALJIC No. 17.41.1 as follows: "The integrity of the trial requires that jurors at all times during the deliberations conduct themselves as required by these instructions. [¶] Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of that situation."

Defendant contends the trial court committed prejudicial error by instructing the jurors they had a duty to inform on one another, in that such an instruction discourages a candid exchange of views by jurors by invading the privacy of jury deliberations and infringes on the jury's power of nullification. We disagree.

The instruction informs the jury that they are to follow the instructions of the trial court. It further informs the jury that if a juror refuses to deliberate, expresses an intention to disregard the law, or expresses an intention to decide the case on an improper basis, the other jurors have a duty to notify the court. Jurors have a duty to follow the instructions of the court and it is proper to so instruct them. (*People v. Baca* (1996) 48 Cal.App.4th 1703, 1707.) The instruction does not interfere with deliberations, it simply requires jurors to report juror misconduct to the trial judge. The clear inference from this instruction is that suspected juror misconduct should be reported to the trial judge, who will determine if there has been any improper conduct and take steps to correct it, if

necessary. It is appropriate for a trial judge to instruct the jurors that they should inform the judge if they are unwilling to follow the law so that they may be excused from jury service. (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1443-1446.) Jurors need not be instructed that they have the power of nullification and may be instructed that they do not have the right to nullify. (*People v. Nichols* (1997) 54 Cal.App.4th 21, 26; *People v. Fernandez* (1994) 26 Cal.App.4th 710, 715-716; see *People v. Williams* (2001) 25 Cal.4th 441, 456.)

We find the use of CALJIC No. 17.41.1 proper and in any event not prejudicial. There was no evidence of deadlock, holdout jurors, or reports of juror misconduct.

III. Abuse of Discretion

Defendant contends that the trial court abused its discretion in refusing to strike two or more of his prior serious felony convictions.[7] We disagree.[8]

Prior to ruling on defendant's motion to strike, the trial court obtained and reviewed the superior court files for his prior serious felony convictions. We take judicial notice of those files. In October 1977, defendant was convicted of petty theft and was placed on probation. In 1978, while on probation, he was arrested for robbery and subsequently convicted of grand theft person. He was sentenced to one year in jail and three years probation. In 1980, defendant was arrested for robbery and assault with intent

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[7] Defendant also contends the trial court's ruling violated the principle of "soundness," as distinct from constituting an abuse of discretion, as purportedly set forth by the Supreme Court in *People v. Williams* (1998) 17 Cal.4th 148, 161-162. Defendant misreads *Williams*. When the Supreme Court discussed reviewing the trial court's decision for soundness, it was referring to review on the merits as opposed to review of the procedural effectiveness of the trial court's order. When actually considering the soundness of the order, the Supreme Court reviewed it for abuse of discretion. (*Id.* at p. 162.)

[8] We reject respondent's claim that this issue is not reviewable on appeal by appellant. (*People v. Gillispie* (1997) 60 Cal.App.4th 429, 433-434.)

to murder. His probation was revoked and he was sentenced to six years in prison. He was paroled in 1983. In 1989, defendant and a codefendant approached two men in a car with a sawed-off shotgun and forced the driver to drive to another location, where the victims were ordered from the car and defendant and his companion took it. Defendant was charged with two counts of kidnapping to commit robbery and two counts of robbery, all with firearm allegations. Defendant entered a plea of guilty to a single count of robbery (Pen. Code, § 211) and was sentenced to prison for four years. This was the first prior serious felony conviction pled and proved in this case. While defendant was on parole for this offense, he committed another robbery. When the victim was stopped at a red light, defendant approached his window, held a knife to his throat, and demanded the victim drive defendant and his companions to another destination. When they arrived, the victim was forced from his car and robbed. Defendant took the victim's driver's license and read the victim's address aloud, stating, "I know where you live" and telling him not to report the incident. Defendant drove off in the victim's car. When police subsequently spotted the car and tried to stop defendant, he led police on a high-speed chase which ended when he lost control of the car, wrecking it. Defendant was charged with kidnapping to commit robbery and robbery. He pleaded guilty to kidnapping (Pen. Code, § 207, subd. (a)) and robbery. He was sentenced to 11 years in prison. Defendant admitted using heroin from 1975 until his 1993 imprisonment. He also tested positive for crack cocaine while on parole for the 1989 robbery. He was released from prison in June 1998 and committed the current offense 18 months later, while still on parole.

"In *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, the Supreme Court held that trial courts have the authority to strike a prior conviction in furtherance of justice under Penal Code section 1385. The court stated that in determining whether to strike a defendant's prior convictions under Penal Code section 1385, the trial court must take into consideration the defendant's background, the nature of his current offense, and other ' "individualized considerations." ' (*Id*. at p. 531.)

"In *People v. Williams* (1998) 17 Cal.4th 148, the Supreme Court further set forth principles which should guide a trial court in the exercise of its discretion under Penal

Code section 1385 and on the standards under which an appellate court is to review that exercise of discretion. The court stated that in *Romero*, it had implied that 'preponderant weight must be accorded to factors intrinsic to the [Three Strikes] scheme, such as the nature and circumstances of the defendant's present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects.' (*People v. Williams*, *supra*, at p. 161.) In deciding whether to strike a prior conviction, and in reviewing a trial court's ruling, '. . . the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.' (*Ibid*.)

" ' "The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. . . . In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." ' (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)" (*People v. Barrera* (1999) 70 Cal.App.4th 541, 553-554.)

Defendant introduced evidence that after his release on parole in 1998, he obtained a job, received a promotion, maintained a stable residence, and tested negative for drugs on a monthly basis. Defendant also relied on letters and testimony of his parole officer, employer, family, friends, and pastor, all supporting his position he was a changed man who was successfully making the transition to becoming a productive member of society. It is apparent the trial court considered these factors, but concluded defendant's criminal conduct on the whole did not fall outside the Three Strikes Law. Defendant's prior serious felony convictions involved deadly weapons and a serious risk of harm to his victims. Nor were defendant's convictions remote in time; defendant was on parole for the first prior serious felony conviction when he committed the offense which led to his second and third convictions, and he was on parole for those when he committed the

instant offense. Defendant's methamphetamine possession mitigates the persuasiveness of his negative drug tests. His year and a half of success on parole prior to this offense is not so long that we can say the trial court abused its discretion in refusing to conclude defendant was a changed man, outside the scope of the Three Strikes Law.

"The record establishes that the trial court here fully considered appellant's background, the nature of his current offense, and the individualized considerations of his long-standing drug addiction and the pattern and nature of his criminal history, and that it properly concluded that appellant was not, even in part, outside the spirit of the Three Strikes scheme. . . . [¶] On this record, where the trial court considered the relevant criteria, including appellant's lengthy criminal history and the timing and nature of his offenses, none of which reflect well upon his prospects, we find no abuse of discretion in the trial court's refusal to strike one or [more] of appellant's prior felony convictions. (*People v. Cline* (1998) 60 Cal.App.4th 1327, 1336-1337.)" (*People v. Barrera*, *supra*, 70 Cal.App.4th at pp. 554-555.)

IV. Cruel and Unusual Punishment

Defendant contends his sentence constitutes cruel and unusual punishment under the California and United States Constitutions. (Cal. Const., art. I, § 17; U.S. Const., 8th Amend.)

A defendant must overcome a considerable burden in a challenge under the cruel and unusual punishment provision of the California Constitution. (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196-1197.) "A punishment may violate the California Constitution although not 'cruel or unusual' in its method, if 'it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted.) The *Lynch* court identified three techniques courts used to administer this rule. First, they examined the nature of the offense and the offender. [Citation.] Second, they compared the punishment with the penalty for more serious crimes in the same jurisdiction.

[Citation.] Third, they compared the punishment to the penalty for the same offense in different jurisdictions." (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1136.)

However, a determination can properly be made based on the first *Lynch* factor alone.[9] (*People v. Weddle, supra,* 1 Cal.App.4th at p. 1197.) The focus on the offense considers the crime both in the abstract and in view of the totality of the circumstances surrounding its commission, including such factors as motive, the manner in which the crime was committed, the extent of defendant's involvement, and the consequences of the acts. (*Ibid.*) The focus on the offender considers factors such as defendant's age, prior criminality, personal characteristics, and state of mind. (*Id.* at p. 1198.)

In this case, defendant has failed to show that his sentence is grossly disproportionate to the crime committed. The trial judge in this case carried out the express intent of the Legislature, punishing defendant not merely for his current felony but also for his recidivism. (*People v. Cooper* (1996) 43 Cal.App.4th 815, 823-825.) "One in [defendant's] position has been both graphically informed of the consequences of

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9 Defendant's claim under the federal Constitution can also be analyzed under a single factor. In *Solem* v. *Helm* (1983) 463 U.S. 277, a majority of the Supreme Court concluded a similar three-part test should govern analysis of federal cruel and unusual punishment claims. It focused on "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." (*Id.* at p. 292.) However, this test did not retain the support of a majority of the court in *Harmelin* v. *Michigan* (1991) 501 U.S. 957. Justice Scalia, joined by Chief Justice Rehnquist, concluded *Solem* was wrongly decided and that the Eighth Amendment does not guarantee proportionality of sentences. (*Id.* at p. 965.) Justice Kennedy, joined by Justices O'Connor and Souter, concluded that the Eighth Amendment prohibits only sentences which are "grossly disproportionate" to the crime. (*Id.* at p. 1001.) These three justices concluded that consideration of the second and third *Solem* factors is necessary only when the first factor suggests the sentence may be grossly disproportionate. When the first factor shows the sentence is constitutional, the analysis is complete. (*Id.* at p. 1005.) Since three justices would uphold a sentence satisfying the first factor, and two justices would uphold a sentence against any proportionality challenge, it is clear that a majority of the Supreme Court would agree that a sentence is constitutional if it does not appear to be grossly disproportionate based on an analysis of the gravity of the offense and harshness of the penalty alone.

lawlessness and given an opportunity to reform, all to no avail. [A recidivism statute] thus is nothing more than a societal decision that when such a person commits yet another felony, he should be subjected to the admittedly serious penalty of incarceration for life, subject only to the State's judgment as to whether to grant him parole." (*Rummel v. Estelle* (1980) 445 U.S. 263, 278.)

In short, defendant has not been sentenced to life in prison because he possessed methamphetamine. Rather, he was so sentenced because he is a serious and violent career criminal who continues to flout the laws of this State. Defendant's sentence is not so disproportionate to his crime that it shocks the conscience and offends fundamental notions of human dignity. Accordingly, this sentence does not violate the prohibition against cruel and unusual punishment.

V. Petition for Writ of Habeas Corpus

Defendant has filed a petition for writ of habeas corpus, alleging ineffective assistance of trial counsel. Defendant contends his trial counsel rendered ineffective assistance by failing to move to suppress the methamphetamine pipe discovered as a result of the initial pat-down search, and the methamphetamine discovered thereafter. Defendant contends his trial counsel should have challenged the initial pat-down search as unsupported by a reasonable suspicion he may have been armed and dangerous. Defendant's argument is premised on the proposition that the search could not have been authorized by the search condition of his parole because the searching deputies did not know he was on parole. But a search of a parolee's person is constitutional even when the searching officer is unaware of the parolee's status.[10] (*In re Tyrell J.* (1994) 8 Cal.4th 68, 74; *People v. Lewis* (1999) 74 Cal.App.4th 662, 668-669.) Defendant has failed to meet his burden of showing that but for counsel's alleged errors, a suppression motion

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10 This issue is currently pending before the Supreme Court. (*People v. Moss*, review granted June 28, 2000, S087478; *People v. Sanders* (2000) 84 Cal.App.4th 1211, review granted Feb. 28, 2001, S094088.)

would have been successful. (*Strickland v. Washington* (1984) 466 U.S. 668, 693-694; *People v. Fosselman* (1983) 33 Cal.3d 572, 584.)

[The remainder of this opinion is to be published.]

DISPOSITION

The judgment is affirmed. The petition for writ of habeas corpus is denied.

CERTIFIED FOR PARTIAL PUBLICATION.

GRIGNON, Acting P.J.

We concur:

ARMSTRONG, J.

WILLHITE, J.*

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* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.